Supreme Court, U.S.
FILED
MAR 12 1997
OFFICE OF THE CLERK

No. 96-1253

In The

Supreme Court of the United States

October Term, 1996

LIONEL ALFRED WEAVER,

Petitioner,

vs.

DENISE LEE WEAVER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

BARRY D. MARTIN
Counsel of Record
WALLACE, SAUNDERS, AUSTIN, BROWN & ENOCHS
Attorneys for Respondent
10111 West 87th Street
P.O. Box 12290
Overland Park, Kansas 66282
(913) 888-1000

70730
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. § 455(a) applies to state court judges.

2. Whether petitioner is barred from alleging lack of due process where he has refused to file a motion for change of judge, or to otherwise request the trial judge to recuse himself.

3. Is the Kansas statute regarding the procedure for change of judge, K.S.A. 20-311d, unconstitutional?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the rules of this Court, respondent Denise Lee Weaver states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and respondent's attorneys.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Rule 29.1 Statement	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
A. Course Of Proceedings And Disposition Of The Case Below.	1
B. Correction of Misstatements In The Petition.	2
Reasons for Denying the Writ	3
I. 28 U.S.C. § 455(a) Does Not Apply To State Court Judges.	3
II. Petitioner Is Barred From Alleging Lack Of Due Process Where He Has Refused To File A Motion For A Change Of Judge, Or To Otherwise Request The Trial Judge To Recuse Himself.	4
III. The Kansas Statute For Change Of Judge, K.S.A. 20-311d, Is Constitutional.	8
Conclusion	11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Davis v. Board of School Commissioners of Mobile County, 517 F.2d 1044 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed. 2d 188 (1976) 10

Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972) 8

In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.), *cert. denied*, 449 U.S. 888, 101 S. Ct. 244, 66 L. Ed. 2d 714 (1980) 10

Shaw v. Garrison, 391 F. Supp. 1353 (E.D. La. 1975), *aff'd*, 545 F.2d 980 (5th Cir.), *rehearing denied*, 555 F.2d 1351 (5th Cir.), *reversed on other grounds*, 436 U.S. 584, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1997) 4

United States v. Carignan, 600 F.2d 762 (9th Cir. 1979) 10

United States v. Kelly, 712 F.2d 884 (1983) 10

Statutes Cited:

K.S.A. 20-311d .....i, 3, 5, 8, 9, 10, 11

28 U.S.C. § 144 ..... 7, 8, 9, 10, 11

Contents

	Page
28 U.S.C. § 451	4
28 U.S.C. § 455	9, 10
28 U.S.C. § 455(a)	i, 3, 4, 5

The respondent, Denise Lee Weaver, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the order of the Supreme Court of the State of Kansas (Order No. 95-74377-AS, dated November 8, 1996).

STATEMENT OF THE CASE

Petitioner has previously filed five (5) appeals with the Court of Appeals of the State of Kansas and two (2) petitions for review with the Supreme Court of the State of Kansas.

Respondent respectfully opposes the petition for writ of certiorari, which distorts and misrepresents the truth, and is intended merely as harassment of respondent.

A. Course Of Proceedings And Disposition Of The Case Below.

This case was commenced November 30, 1992 with the filing of a Petition for Divorce. It was tried to the district court on August 12 and 13, 1993, and a Journal Entry of Decree of Divorce was entered November 30, 1993.

Petitioner was obviously unsatisfied with the judgment of the trial court and has elected to file multiple appeals. The one issue which petitioner continually raises is that the trial judge was bias or prejudiced against him, but has never stated why the trial judge would not be impartial. Neither petitioner nor his counsel have ever requested the trial judge to recuse himself, nor has there ever been a motion for change of judges filed.

Of the five (5) appeals to the Court of Appeals of the State of Kansas, petitioner has been totally unsuccessful, with the trial judge being affirmed on all issues, except a small issue of calculation of back maintenance, which the appeals court ordered to be recalculated.

The Supreme Court of the State of Kansas has denied review on two (2) prior occasions.

B. Correction Of Misstatements In The Petition.

Petitioner has misrepresented one fact throughout the multiple appeals, and that is that the trial judge and respondent's counsel had ex parte communications regarding the case. It is this allegation which petitioner continues to raise as grounds for a new trial.

Petitioner contends the trial judge and respondent's counsel had telephone conversations at night about the case (Petitioner's Petition for Writ of Certiorari, pps. 19-20). Of course, such telephone conversations never occurred.

The truth is that at the conclusion of the two (2) day trial, counsel for the parties wanted to know when a decision could be anticipated from the trial judge. The trial judge responded that the only time he had to work on decisions was at night, but that he intended to have a decision for the parties as soon as possible. Counsel for respondent then stated that he was aware the judge worked at night, as he had once received a telephone call from him at 10:00 at night *about a case.*

The case referred to was not this case; the telephone call had occurred many years earlier; and the sole purpose of the telephone call from the court on that occasion was to confirm a case had not been settled prior to the judge preparing an opinion and decision.

Again, this telephone call was unrelated to *Weaver,* and was merely an inquiry from the court regarding whether a case had settled. This is not grounds for showing bias or prejudice on the part of the trial judge.

The second material misrepresentation by the petitioner is his representation by implication that he has previously sought a change of judge.

At no time during the district court proceedings did petitioner or his counsel ever request a change of judge. Petitioner asserts he can obtain no relief, implying that he desires a different judge, but fails to mention that he and his counsel never filed a motion for change of judge.

Petitioner misleads this Court by arguing he can receive no relief under the Kansas procedure for change of judge (K.S.A. 20-311d), when in fact he has never sought such relief.

REASONS FOR DENYING THE WRIT

I.

28 U.S.C. § 455(a) DOES NOT APPLY TO STATE COURT JUDGES.

Petitioner argues that 28 U.S.C. § 455(a) applies to a district court judge for the State of Kansas. 28 U.S.C. § 455(a) states:

> **§ 455. Disqualification of justice, judge, or magistrate.**
>
> (a) Any justice, judge, or magistrate *of the United States* shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(Emphasis added).

As used in Title 28 "the term judge of the United States"

includes judges of the courts of appeals, district courts, court of international trade, and any court created by an Act of Congress, the judges of which are entitled to hold office during good behavior. 28 U.S.C. § 451.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court. 28 U.S.C. § 451.

Chapter 21 of Title 28 has no applicability to state courts. As stated in *Shaw v. Garrison,* 391 F. Supp. 1353 (E.D. La. 1975), *aff'd,* 545 F.2d 980 (5th Cir.), *rehearing denied,* 555 F.2d 1351 (5th Cir.), *reversed on other grounds,* 436 U.S. 584, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1977):

> As defined in 28 U.S.C. 451, "court of the United States" refers only to the Article III courts and certain federal courts created by Act of Congress. It does not include the various state courts.

Clearly, 28 U.S.C. § 455(a) has no applicability to state courts, and therefore is inapplicable to the case at point.

II.

PETITIONER IS BARRED FROM ALLEGING LACK OF DUE PROCESS WHERE HE HAS REFUSED TO FILE A MOTION FOR CHANGE OF JUDGE, OR TO OTHERWISE REQUEST THE TRIAL JUDGE TO RECUSE HIMSELF.

Petitioner argues that failure of the trial judge to recuse himself pursuant to 28 U.S.C. § 455(a) denied petitioner due process of law.

First, as stated above, 28 U.S.C. § 455(a) is not applicable to state courts. Secondly, petitioner has never requested the trial judge to recuse himself from the case.

Apparently, petitioner believes the judge is to read petitioner's mind and conclude "Oh, Mr. Weaver, you are accusing me of bias and prejudice, and want me to recuse myself." In fact, the only time petitioner has ever accused the trial court of bias and prejudice is in his appellate briefs.

The procedure for obtaining a change of judge is set forth in K.S.A. 20-311d, which states:

> **20-311d. Change of judge; procedure; grounds.**
>
> (a) If a party or a party's attorney believes that the judge to whom an action is assigned cannot afford that party a fair trial in the action, the party or attorney may file a motion for change of judge. The motion shall not state the grounds for the party's or attorney's belief. The judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. If the judge disqualifies the judge's self, the action shall be assigned to another judge by the administrative judge. If the judge refuses to disqualify the judge's self, the party seeking a change of judge may file the affidavit provided for in subsection (b). If an affidavit is to be filed it shall be filed forthwith.

(b) If a party or a party's attorney files an affidavit alleging any of the grounds specified in subsection (c), the administrative judge shall at once determine, or refer the affidavit to another district judge for prompt determination of the legal sufficiency of the affidavit. If the affidavit is filed in a district court in which there is no other judge who is qualified to hear the matter, the administrative judge shall at once notify the departmental justice for the district and request the appointment of another district judge to determine the legal sufficiency of the affidavit. If the affidavit is found to be legally sufficient, the case shall be assigned to another judge.

(c) Grounds which may be alleged as provided in subsection (b) for change of judge are that:

(1) The judge has been engaged as counsel in the action prior to the appointment or election as judge.

(2) The judge is otherwise interested in the action.

(3) The judge is related to either party to the action.

(4) The judge is a material witness in the action.

(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice, or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.

(d) In any affidavit filed pursuant to this section, the recital of previous rulings or decisions by the judge on legal issues or concerning the legal sufficiency of any prior affidavits filed by counsel for a party in any judicial proceeding, or filed by such counsel's law firm, pursuant to this section, shall not be deemed legally sufficient for any belief that bias or prejudice exists.

This statute is similar to 28 U.S.C. § 144, the federal procedure for change of a judge on grounds of bias or prejudice. The petitioner or his attorney need only file a motion for change of judge, and the judge shall promptly hear the motion informally. If the judge refuses to disqualify himself, the party seeking a change of judge may file an affidavit alleging grounds for a change of judge, and the administrative judge or another judge will determine the matter. If the affidavit is found legally sufficient, the case is assigned to another judge.

Petitioner has never filed the motion for change of judge. Had such a motion been filed, it might have been sustained. If the judge had denied the motion, petitioner could have filed the affidavit pursuant to K.S.A. 20-311d, and a change of judge would have been forthcoming had the affidavit been legally sufficient.

K.S.A. 20-311d does not contain a timeliness provision similar to the one found in 28 U.S.C. § 144, which inquires a "timely" affidavit. However, failure to ever file the required motion or affidavit constitutes waiver of the rights granted thereunder for a change of judge.

Petitioner, by his own inaction, has waived his right to a change of judge, and cannot now allege his due process rights were denied him because the judge failed to recuse himself. No allegation of bias or prejudice has ever been raised in this case at the district court level.

III.

THE KANSAS STATUTE FOR CHANGE OF JUDGE, K.S.A. 20-311d, IS CONSTITUTIONAL.

Most states have one of three statutory procedures for recusation for bias or prejudice. Those three types of procedures were discussed in *Hulme v. Woleslagel,* 208 Kan. 385, 493 P.2d 541 (1972), wherein the court stated:

> Some states require that the factual issues of prejudice be heard and determined before a judge is to be recused, that is, his actual prejudice must be proved in order to obtain his disqualification.

* * *

> The next group comprises those jurisdictions which require the filing of an affidavit of prejudice containing facts but without a hearing on the fact of prejudice. The affidavit must contain a general allegation of prejudice, plus factual statements supporting the charge of prejudice. . . . Representative of this group is the federal statute [28 U.S.C. § 144] which provides that when a party to a proceeding in district court files a timely and sufficient affidavit, . . . such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. . . .
>
> * * *
>
> The third group of jurisdictions requires only the filing of an affidavit stating that the affiant believes he cannot obtain a fair trial because of the judge's bias or prejudice. . . . [F]iling of the affidavit itself disqualifies the judge and not the actual existence of circumstances which would in fact disqualify him.

(Pps. 388-389).

Kansas takes the middle ground, as in 28 U.S.C. § 144.

The Kansas statute, K.S.A. 20-311d, is similar to the federal procedure, 28 U.S.C. § 144. However, K.S.A. 20-311d requires that the administrative judge or another district court judge determine the legal sufficiency of the affidavit, not the judge against whom bias or prejudice is alleged.

28 U.S.C. § 144 and 28 U.S.C. § 455 use similar language,

and are intended to govern the same area of conduct, they have been construed *in pari materia,* and the test of the legal sufficiency of a motion for disqualification is the same under both statutes. *See In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 965 (5th Cir.), *cert. denied,* 449 U.S. 888, 101 S. Ct. 244, 66 L. Ed. 2d 714 (1980); *United States v. Carignan,* 600 F.2d 762, 764 (9th Cir. 1979); *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed. 2d 188 (1976); *United States v. Kelly,* 712 F.2d 884, 889 (1983).

Section 144 and Section 455 of Title 28 pertain to the same subject matter and thing, and should be read together. Section 144 requires the filing of an affidavit, and Section 455, though self-executing, with no specific procedure set forth therein, is generally invoked by the filing of a motion.

The Kansas procedure is similar. The concerned party first files a motion with the district court asking the judge to recuse himself. If the judge fails to recuse himself, the party files the necessary affidavit, and that affidavit is reviewed by another judge to determine its legal sufficiency. If legally sufficient, a new judge is assigned the case.

In fact, the procedure is much fairer than the federal procedure because it requires the additional safeguard of review by another judge.

The constitutionality of Section 144 and Section 455 of Title 28 have never been challenged. The procedure set forth in K.S.A. 20-311d has never before been challenged as unconstitutional. K.S.A. 20-311d afforded petitioner a fair and impartial procedure to seek a change of judge, but petitioner refused or neglected to follow the same.

Contrary to what petitioner argues, a statute for recusal of a judge need not be self-executing to be constitutional, as evidenced by 28 U.S.C. § 144, which requires the filing of an affidavit, just like K.S.A. 20-311d.

CONCLUSION

For the reasons stated herein, writ of certiorari should be denied.

Respectfully submitted,

BARRY D. MARTIN
Counsel of Record
WALLACE, SAUNDERS, AUSTIN,
BROWN & ENOCHS
Attorneys for Respondent
10111 West 87th Street
P.O. Box 12290
Overland Park, Kansas 66282
(913) 888-1000